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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BLUE CIRCLE, INC., an Alabama Corporation,

Petitioner,

v.

GEORGIA DEPARTMENT OF REVENUE and
BART L. GRAHAM, REVENUE COMMISSIONER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF COBB COUNTY, STATE OF GEORGIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Reich v. Collins*, 513 U.S. 106, 115 S. Ct. 547 (1994) this Court held that Georgia cannot hold out a statutory remedy and then declare the remedy does not exist. In Georgia, a tax refund claimant is entitled to a hearing and one appeal. Does Georgia's practice of limiting tax refund claimants to a discretionary appeal while affording a direct appeal to other participants in administrative agency proceedings deny tax refund claimants due process and equal protection of the law?

STATEMENT PURSUANT TO RULE 29.6

La Farge Building Materials, Inc. is the successor in interest to Blue Circle, Inc. La Farge Building Materials, Inc. is wholly owned by Blue Circle America, Inc.

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OPINIONS BELOW

1. The Department of Revenue denied Petitioner's Refund claim by letter without any formal or informal hearing. The letter cited non-existent law.

2. The Cobb County Superior Court in civil action file number 98-1-2950-33 granted the Respondent's Motion for Summary Judgment denying Petitioner's claim for refund of sales tax on industrial materials which become a component part of the final manufactured product and which should have been exempt under O.C.G.A. § 48-8-3(35)(A).

3. The Georgia Court of Appeals in case number A04A0080 dismissed Appellant's Direct Appeal on October 3, 2003, claiming that Petitioner was limited to a discretionary appeal under O.C.G.A. § 5-6-35(a)(1).

STATEMENT OF JURISDICTION

The Georgia Supreme Court denied Appellant's Petition for Certiorari (February 16, 2004) and subsequent Motion for Reconsideration on March 5, 2004. Tax refund claimants in Georgia are entitled to either an administrative hearing under O.C.G.A. § 48-2-35 or a direct appeal under O.C.G.A. § 5-6-35(a)(1). The Georgia Appellate Courts' denial of Appellant's direct appeal, when the Georgia Department of Revenue had denied an administrative review, violated Appellant's due process and equal protection rights under the Federal and State Constitutions as announced by this Court in *Reich v. Collins*, 513 U.S. 106, 115 S. Ct. 547 (1994). In *Reich*, this Court held that a state may not do what Georgia has done here, hold out a purported remedy, and then declare that the remedy does not exist. Thus, this court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment of the United States Constitution:

> No state shall make or enforce any law which shall abridge the privilege and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The Georgia Constitution, Art. 1, § 1, ¶II.:

> Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.

3. O.C.G.A. § 5-6-35(a)(1) provides for discretionary appeals in the following cases:

> Appeals for decisions of the Superior Courts reviewing decisions of the Worker's Compensation Board, Auditors, state and local administrative agencies, and lower courts by certiorari or de novo proceedings . . .

4. O.C.G.A. § 48-2-35(b)(2).

> In the event that taxpayer desires a conference or hearing before the commissioner in connection with any claim for refund, he shall specify such

> desire in writing in the claim and, if the claim conforms with the requirements of this Code section, the commissioner shall grant a conference at a time he shall reasonably specify.

5. O.C.G.A. § 48-2-35(b)(3).

> The commissioner or his delegate shall consider information contained in the taxpayer's claim for refund, together with such other information as may be available, and shall approve or disapprove the taxpayer's claim and notify the taxpayer of his action.

6. O.C.G.A. § 48-2-35(b)(4).

> Any taxpayer whose claim for refund is denied by the commissioner or his delegate or whose claim is not decided by the commissioner or his delegate within one year from the date of filing the claim shall have the right to bring an action for a refund in the superior court of the county of the residence of the taxpayer.

STATEMENT OF THE CASE

Georgia law provides litigants before administrative agencies with "two tribunal review." If the administrative agency conducts a fact-finding proceeding, parties adversely affected by the agency decision have a right of direct review in the Superior Court. If the agency acts without conducting a fact-finding proceeding, a party adversely affected by its decision has a right to a hearing *de novo* in Superior Court and a right to a direct appeal to the Court of Appeals.

McCaughey v. Murphy, 267 Ga. 64, 473 S.E.2d 762 (1996). Any appellate review in addition to the two-tribunal review is discretionary. O.C.G.A. § 5-6-35(a)(1).

In this case, Petitioner filed for a tax refund with the Georgia Department of Revenue (GDOR). Without conducting an administrative hearing, the GDOR denied the refund request. Petitioner then filed a petition for refund in the Superior Court of Cobb County. The Superior Court conducted a *de novo* review of Petitioner's claim and granted GDOR's motion for summary judgment. Petitioner then filed a direct appeal with the Georgia Court of Appeals. GDOR filed a Motion to Dismiss, claiming that Petitioner was entitled only to a discretionary appeal, not a direct appeal. In response, Petitioner argued that GDOR had failed to grant an agency hearing as required by O.C.G.A. § 48-2-35(b)(3), and that under *McCaughey* Petitioner had a due process right to a two-tribunal review. The Georgia Court of Appeals granted GDOR's Motion to Dismiss. Petitioner filed a timely motion for reconsideration, citing this Court's opinion in *Reich v. Collins*, 513 U.S. 106, 115 S. Ct. 547 (1994) for the proposition that due process requires that a state provide procedural safeguards against unlawful exaction of taxes. The motion also raised an equal protection argument that Petitioner receive the same two tribunal review as all other litigants covered by O.C.G.A. § 5-6-35(a)(1) and *McCaughey*. The Georgia Court of Appeals denied reconsideration. A timely Petition for Certiorari was filed with the Georgia Supreme Court raising the same constitutional claims raised in the Court of Appeals. The Georgia Supreme Court denied the Petition for Certiorari and a timely Motion for Reconsideration on March 5, 2004.

GDOR's failure to conduct an appropriate administrative review, coupled with the Georgia Court of Appeals failure to permit a direct appeal have deprived Petitioner of the two tribunal review mandated by Georgia law, in violation of the due process and equal protection clauses of the United States Constitution.

ARGUMENT AND CITATION OF AUTHORITY IN SUPPORT FOR GRANTING THE PETITION

1. Petitioner is Entitled to a Tax Refund

Petitioner, Blue Circle, Inc., manufactures Portland cement. Petitioner purchases and consumes iron balls, iron chains, firebrick, coal, and coke in manufacturing the Portland cement. These industrial materials serve the dual purpose of assisting in the manufacturing process and supplying needed elements to the final Portland cement product. The Georgia Code, GDOR Regulations, and binding case precedent exempt from sales tax industrial materials simultaneously having an exempt and non-exempt purpose provided their constituent elements become a component part of, or are impregnated into, the final manufactured product. O.C.G.A. § 48-8-3(35)(A), Regulations § 560-12-2-.64, *Blackmon v. J.D. Jewell, Inc.*, 126 Ga. App. 679 (1972); *Blackmon v. Atlantic Steel Company*, 130 Ga. App. 492 (1973). The iron balls and chains both help grind and mix the cement, and then decompose into the mix to supply necessary iron to the cement mixture. The firebrick fuses into the cement mixture to add necessary silica and aluminum, and the coal and coke add necessary ash, silica, and aluminum to the cement mix. Petitioner paid tax on the exempt industrial materials, and then filed a claim for refund.

2. GDOR Denied the Refund Without a Hearing Based on Non-Existent Law

The GDOR denied Petitioner's claim for refund in a two-sentence denial. That letter provided:

> Your seventeen claims for refund of sales tax paid in the amount of $548,531 dated (see attached) has been considered and is herewith denied. The denial is based on the fact that according to Regulation 48-8-3(35)(B) your refund request for industrial materials does not qualify for exemption.

There is no Regulation 48-8-3(35)(B). The GDOR sent a form denial letter to Petitioner without reviewing the claim or granting a hearing. There is no indication that the GDOT ever reviewed the substance of the claim or the law as applied to the facts of the claim. Indeed, the regulation cited does not even exist. Petitioner subsequently attempted to no avail to present factual evidence to the GDOR that the materials that were the subject of the claim were ingredients of the manufactured product later sold at retail.

This Court's review of this case is of great concern to the Georgia taxpaying public. The Georgia legislature has authorized an administrative review to a refund claimant yet GDOR routinely denies the right to review by failing to provide a space on the claim form to request a hearing and refusing to grant a hearing upon any other type of request. If GDOR refuses to grant an administrative review, then refund claimants are entitled to a direct appeal. The refusal by Georgia's appellate courts to grant a direct appeal in these cases deprives tax refund claimants of constitutional due process and equal protection of the laws.

3. Georgia's Failure to Provide Tax Refund Claimants Two-Tribunal Review Denies Due Process and Equal Protection of the Law

Georgia law clearly requires the GDOR to provide an administrative review to tax refund claimants. O.C.G.A. § 48-2-35(b)(2) provides that a taxpayer contesting a tax by claim for refund may request a conference in writing on the claim form, in which case "the commissioner *shall* grant a conference at a time he shall reasonably specify." Despite this unequivocal obligation to conduct a conference or hearing, GDOR evades this obligation by not providing a space on the claim form to request a conference or hearing. In the absence of a written request for a hearing or conference, the taxpayer can orally request a conference and submit evidence to the GDOR. O.C.G.A. § 48-2-35(b)(3) then obligates the commissioner to consider "such other information as may be available" in deciding the taxpayer's claim. Despite Petitioner's attempt to invoke this statutory right to present evidence in a conference or hearing, GDOR simply rejected Petitioner's claim for refund out of hand. This action forced Petitioner to rely on the *de novo* review provision of O.C.G.A. § 48-2-35(b)(4) by filing an action in superior court. Thus, GDOR's refusal to conduct an administrative proceeding thwarted the intent of Georgia law that the first tribunal to review Petitioner's claim be the administrative agency. Under Georgia law, an administrative agency hearing is a prerequisite for meeting the minimal requirements of due process of law. *Fulton County Board of Assessors v. Saks Fifth Avenue, Inc.* 248 Ga. App. 836, 547 S.E.2d 620 (2001).

If GDOR fails to provide a tax refund claimant with a conference or hearing to present evidence, the first of the

two-tribunal review occurs in the *de novo* review in the superior court. That is what happened in the present case. But in that circumstance the Petitioner's due process right to a two tribunal review can be satisfied only if the Georgia courts provide a direct, mandatory appeal of the decision of the superior court. Here the Georgia Court of Appeals relegated Petitioner to a discretionary appeal and dismissed Petitioner's case without reaching the merits. This amounts to a denial of due process of law.

O.C.G.A. § 5-6-35(a)(1) limits a taxpayer to a discretionary appeal only if the superior court has acted as a reviewing court to a decision of an administrative agency. In *McCaughey v. Murphy*, 267 Ga. 64, 473 S.E.2d 762 (1996), the Georgia Supreme Court held that the discretionary appeals statute does not apply if the administrative agency fails to conduct a meaningful hearing. In other words, if GDOR denies a refund claimant a meaningful review as required by statute, Petitioner is entitled to a direct appeal. *McCaughey* holds that an agency determination must be pursuant to a meaningful assessment of the facts and the law before the superior court can act as a reviewing court. Absent legitimate findings of fact and conclusions of law, the superior court has nothing to review. "[A]n ultimate conclusion will not suffice as findings of fact and conclusions of law." *Pruitt v. First National Bank of Habersham County*, 142 Ga. App. 100, 101, 235 S.E.2d 617 (1977). Because GDOR did not issue findings to which Petitioner could make exceptions on appeal, the superior court did not sit as a reviewing court and Petitioner is entitled to a direct appeal to complete two-tribunal review. *See Citizens and Southern National Bank v. Rayle*, 246 Ga. 727, 273 S.E.2d 139 (1980); *Ferguson v. Composite State Board of Medical Examiners*, 275 Ga. 255, 564 S.E.2d 715 (2002).

A citizen is entitled to due process and equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article 1, Section 1, paragraph II of the Georgia Constitution. Petitioner has shown above that the denial of its direct appeal is a due process violation. It is also an equal access violation. Petitioner is a member of a class of citizens that are subject to the Georgia discretionary appeals statute, O.C.G.A.§ 5-6-35(a)(1). Georgia courts are clear that each citizen covered by the statute is entitled to an initial adjudication by an administrative agency and a subsequent judicial appeal. *Citizen's and Southern National Bank v. Rayle, supra.* Because GDOR summarily denied Petitioner an administrative hearing, the *de novo* proceeding in the superior court was not a judicial review of an agency decision, and the appellate courts' subsequent denial of a direct appeal deprived Petitioner of the two tribunal review required by Georgia law.

To deny tax refund claimants a two-tribunal review afforded to all others in the class governed by O.C.G.A. § 5-6-35(a)(1) is a violation of the equal protection clause. The purpose of the discretionary review statute was to reduce the workload of appellate courts in cases where superior court review of an agency decision had provided a litigant with two-tribunal review. *Citizens and Southern National Bank v. Rayle, supra.* While the administrative convenience of limiting each litigant to one initial adjudication and one appeal may render O.C.G.A. § 5-6-35(a)(1) facially constitutional, its application to deny one sub-class of any appeal whatsoever violates the equal protection rights of members of that subclass.

> [A] legislative intent to serve administrative convenience by classification, though adequate to support the classification in some circumstances,

> is impermissible when that classification amounts to an absolute barrier to the enjoyment by one subclass . . . of benefits presumptively made available to another subclass. *Gentry v. United States*, 212 Ct.Cl. 1, 546 F.2d 343 (1976).

There is no rational basis for denying a tax refund claimant a two-tribunal review afforded to all other litigants seeking review of the decision of an administrative agency in Georgia. The combined actions of GDOC and the appellate courts of Georgia have denied Petitioner due process and equal protection under the law.

CONCLUSION

By refusing to conduct a meaningful administrative hearing or affording a right of direct appeal, GDOR and the Georgia appellate courts have violated this Court's ruling in *Reich v. Collins*, 513 U.S. 106, 115 S. Ct. 547 (1994). While a state is not required to provide both pre-deprivation and post-deprivation procedures in tax cases, it cannot do what Georgia did here, provide by statute for a two-tribunal review, and then limit tax refund claimants to a single review.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX

APPENDIX A — ORDER OF THE SUPERIOR COURT OF COBB COUNTY, STATE OF GEORGIA FILED MAY 5, 2003

IN THE SUPERIOR COURT OF COBB COUNTY STATE OF GEORGIA

Civil Action File

Number: 98-1-2950-33

BLUE CIRCLE, INC.,

Plaintiff,

v.

T. JERRY JACKSON, Revenue Commissioner, Department of Revenue, State of Georgia,

Defendant.

ORDER

On September 23, 2002, this case came before the Court on Defendant's Motion for Summary Judgment. Plaintiff has also moved for summary judgment, but that motion is not addressed by the Court at this time. At oral argument, Michelle Young argued for the Defendant, and Chris Compton argued for the Plaintiff. After considering the oral and written argument of the parties and the affidavits filed in this case, the Court makes the following findings of fact and conclusions of law.

Appendix A

FINDINGS OF FACT

Plaintiff manufactures portland cement. To make portland cement, Plaintiff uses refractory bricks, iron chains, iron balls and coal and coke. Plaintiff's cement manufacture occurs in roughly three stages. First, iron balls are used to mix and grind limestone, clay, and sand into a powder called the "raw mix". The iron balls are worn down by the nature of their use, and additional iron balls are added periodically. Approximately once per year, all of the iron balls are removed and checked for size. Second, the raw mix is fed into a kiln where temperatures are raised to approximately 2300 to 3000 degree Fahrenheit. Refractory bricks are used to protect the steel shell of the kiln from heat. The heat of the kiln damages the refractory bricks over time. When the refractory bricks can no longer protect the steel walls of the kiln, they are replaced, and the old bricks are placed in the raw mix and reused to make cement. Plaintiff only purchases refractory bricks that can be reused as raw mix. Though bricks containing chromium would last longer in protecting the kiln's shell, those bricks are not purchased because they cannot be reused in the raw mix. Iron chains are strung in the kiln to conduct heat throughout the kiln. These chains are replaced approximately once per year after heat and abrasion renders them unusable. The kiln is heated by burning natural gas and coal and coke. After passing through the kiln, the raw mix becomes a substance called clinker. In the third stage, the clinker is placed in the finish mill where iron balls grind the clinker and gypsum is added. After grinding in the finish mill, the clinker becomes portland cement.

Appendix A

Pursuant to the Georgia Sales and Use Tax Law, O.C.G.A. § 48-8-1 *et seq.*, Plaintiff paid sales tax when it purchased refractory bricks, iron chains, iron balls and coal and coke. Plaintiff requested a refund of sales tax paid on the items based on the theories that either the items were exempt from tax by an exception for "industrial materials" contained in O.C.G.A. § 48-8-3(35) or the items were purchased for resale. Defendant denied Plaintiffs request for a refund on the sales tax. Plaintiff filed this action to appeal the Commissioner's decision pursuant to O.C.G.A. § 48-2-35(b)(4).

CONCLUSIONS OF LAW

Under O.C.G.A. § 9-11-56, to prevail upon a motion for summary judgment, "the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in a light most favorable to the non-moving party, warrant judgment as a matter of law." *Lau's Com., Inc. v. Haskins*, 261 Ga. 491 (1991). In considering a motion for summary judgment, the party opposing the motion is entitled to the benefit of all reasonable inferences that may be drawn from the evidence. *See Bowman v. United States Life Insurance Co.*, 167 Ga. App. 673 (1983), *see also, McGinty v. Goldens & Co.*, 208 Ga. App. 248, 430 S.E.2d 185 (1993).

Retail purchasers of tangible personal property are liable for sales tax. O.C.G.A. § 48-830(a). A retail sale is a sale for any purpose other than for resale or services. O.C.G.A. § 48-82(6)(A). Stated another way, if you are going to resell an item, you do not have to pay sales tax when purchasing that item. Additionally, Georgia's revenue code specifically

excludes the purchase of "industrial materials" which are subsequently included as a component part of a finished product that is sold to consumers. O.C.G.A. § 48-8-3(35).

Because the refractory bricks, iron chains, iron balls and coal and coke purchased by Plaintiff are each used in a different manner, the Court addresses whether each of these items are taxable to Plaintiff in turn.

1. Refractory Brick

An item that is recycled into a product because it has broken or has outlived its usefulness does not constitute an industrial material. *Blackmon v. Atlantic Steel Company*, 130 Ga. App. 492, 497 (1973). The Atlantic Steel court found that the molds used by the taxpayer to make steel were taxable purchases though the molds were reused as raw material after their usefulness as a mold ended. "It is only when the molds and stools became broken and unfit for use as molds and stools that they became scrap iron, and industrial material, and a part of the ultimate product manufactured by the taxpayer." *Atlantic Steel*, 130 Ga. App. at 497. The Atlantic Steel court held that the molds and stools used in making steel were taxable and were not excluded by the exception for industrial materials. The Atlantic Steel court came to its decision by applying the reasoning of a Utah Supreme Court case. *Union Portland Cement Co. v. State Tax Commission*, 110 Utah 135, 170 P.2d 164 (Utah 1946). In Union Portland Cement, the Utah Supreme Court held that refractory brick,

iron balls, and coal used in making cement was taxable under Utah's sales tax.[1]

In this case, Plaintiff reuses the refractory brick by putting it in the raw mill only after the brick has become useless in protecting the kiln's steel shell. This secondary use does not convert the refractory brick into industrial materials. The fact that Plaintiff purchases only bricks that may be reused does not change this result. Plaintiff makes an economic decision when it opts to use refractory bricks with a secondary use rather than longer lasting bricks containing chromium with no secondary use. The subsequent recycling of the refractory brick does not convert the brick into an item purchased for resale or a component part of the finished cement. Therefore, the Court finds that the refractory brick purchased by Plaintiff is taxable.

2. Iron Chains

Plaintiff argues that the iron chains used in making cement are industrial materials because iron from the chains ends up in the product cement. Plaintiff argues that it intends to add iron to the cement via the chains, and that the chains' contribution to the cement makes the chains industrial materials.

Plaintiff compares the iron chains to the graphite electrodes addressed in the Atlantic Steel case to support the

1. Though the Atlantic Steel court felt that the Utah case was not "completely on all fours" with the facts before it, *Atlantic Steel,* 130 Ga. App. at 497, the facts in Union Portland Cement case parallel the facts in this case.

argument that the iron chains are a component part of the cement. In that case the graphite electrodes were used both to heat the steel with electricity and to add carbon to molten steel. *Atlantic Steel*, 130 Ga. App. at 497. If the carbon content of the steel was too low, old used electrodes were added to the molten steel. Id. The average life span of an electrode was four hours, and in that time approximately 15 batches of steel would be produced. Atlantic Steel, 130 Ga. App. at 494. "The electrodes [were] totally consumed in the steel making process . . ." *Atlantic Steel*, 130 Ga. App. at 497.

In this case, the average life span of the iron chains is an entire year. The iron chains are not totally consumed in the cement making process, and old chains are not added to the raw materials to make more cement. The Court finds that the graphite electrodes in the Atlantic Steel case are not analogous to the iron chains used by Plaintiff. Any iron transferred to the cement product by the iron chains is secondary to the chains' primary purpose of transferring heat through the kiln. The incidental effect of adding iron through heat and abrasion does not convert the iron chains into a component part of portland cement or an item purchased for resale. Therefore, the Court finds that the iron chains are taxable.

3. Iron Balls

Plaintiff argues that the iron balls used in the raw mill and the finishing mill are industrial materials because iron from the balls ends up in the product cement. Plaintiff argues that it intends to add iron to the cement via the balls, and that the balls' contribution to the cement makes the balls industrial materials.

As with the iron chains, the iron balls are not totally consumed in the cement making process. Any iron transferred to the cement from the balls is incidental to the balls' primary purpose of grinding the material to dust. This incidental or secondary effect does not convert the iron balls into an item purchased for resale or a component part of portland cement. Therefore, the Court finds that the iron balls are taxable.

4. Coal and Coke

Industrial materials included as a component part of a finished product are exempted from the Georgia Sales and Use Tax. O.C.G.A. § 48-8-3(35)(A)(i). However, this exemption does not include materials used for heat, light, power or refrigeration in any phase of the manufacturing process. O.C.G.A. § 48-8-3(35)(B). Plaintiff seeks a refund of sales tax it paid on coal and coke used in the kiln. Plaintiff argues that the coal and coke serves a dual purpose as a component part of the cement and as fuel to heat the kiln.

On the plain language of O.C.G.A. § 48-8-3(35)(B), a material used for heat cannot be considered an industrial material under O.C.G.A. § 48-8-3(35). Because the coal and coke are burned to heat the kiln, it cannot be considered industrial materials that are made component parts of a finished product. Furthermore, the Court finds that these items are not purchased for resale by Plaintiff. Therefore, the Court finds that the coal and coke purchased by the Plaintiff are taxable.

Appendix A

CONCLUSION

The Court finds that the refractory brick, iron chains, iron balls, and coal and coke purchased by Plaintiff are neither purchased for resale nor industrial materials under O.C.G.A. § 48-8-3(35). Based on the above reasoning, the Defendant's Motion for Summary Judgment is **GRANTED.**

SO ORDERED, this 5th day of May, 2003.

s/ James G. Bodiford, Judge
JAMES G. BODIFORD, JUDGE
Cobb County Superior Court
Cobb Judicial Circuit

APPENDIX B — ORDER OF THE COURT OF APPEALS OF THE STATE OF GEORGIA DATED OCTOBER 3, 2003

COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA, October 3, 2003

The Court of Appeals hereby passes the following order

A04A0080. BLUE CIRCLE, INC. v. T. JERRY JACKSON, REVENUE COMMISSIONER et al.

Blue Circle Inc. filed a claim for-refund-of sales tax paid on certain items. The refund claim was denied and Blue Circle, Inc. filed this action predicated on OCGA § 48-2-35 (b) (4). After the superior court entered summary judgment against it, Blue Circle, Inc. filed this direct appeal.

However, an appeal from a decision of the superior court reviewing decisions of a state administrative agency must be presented by discretionary application. OCGA § 5-6-3 5 (a) (1). Here, the superior court was reviewing the Department of Revenue's decision pursuant to the authority of OCGA § 48-2-35 (b) (4), thus a granted discretionary application to appeal was required in order to permit appellate review.

Therefore, after consideration of the response filed by Blue Circle, Inc., the motion to dismiss submitted by the Department of Revenue and the State Revenue Commissioner is GRANTED and this direct appeal is hereby DISMISSED for lack of jurisdiction. *Olin Corp. v. Collins*, 261 Ga. 849 (413 SE2d 193) (1992).

s/ Will L. Mart, Clerk

APPENDIX C — LETTER TO MR. DAVID WALLACE FROM THE DEPARTMENT OF REVENUE DATED APRIL 17, 1996

DEPARTMENT OF REVENUE
Sales and Use Tax Division
P.O. Box 740390
Atlanta, Georgia 30374-0390
Telephone: (404) 656-4060

Marcus E. Collins, Sr.
Commissioner

Gary E. Robinson
Director

Ronald A. Wood
Assistant Director

April 17, 1996

Mr. David Wallace
c/o COMPTON & ASSOCIATES, L.L.P
Suite 200
1521 Johnson Ferry Road
Marietta, Georgia 30062-6438

Re: Blue Circle, Inc.
C#: 200-79-01492-7

Dear Mr. David Wallace:

Your seventeen claims for refund of sales tax paid in the amount of $548,531.00 dated (see attached) has been considered and is herewith denied.

Appendix C

The denial is based on the fact that according to Regulation 48-8-3(35)(B) your refund request for industrial materials does not qualify for exemption.

Sincerely,

State Revenue Commissioner
BY: s/ Lauraetta A. Evans
Lauraetta A. Evans
Refund Examiner

APPENDIX D — ORDER OF THE SUPREME COURT OF THE STATE OF GEORGIA DENYING PETITION FOR CERTIORARI DATED FEBRUARY 16, 2004

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: February 16, 2004

Vivian D. Hoard
2000 Powers Ferry Road
Suite 535
Marietta GA 30303

Case No. S04CO395

BLUE CIRCLE, INC. v. GEORGIA DEPARTMENT OF REVENUE et al.

COURT OF APPEALS CASE NO. A04AO080

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sherie M. Welch, Clerk

APPENDIX E — ORDER OF THE SUPREME COURT OF GEORGIA DENYING MOTION FOR RECONSIDERATION DATED MARCH 5, 2004

SUPREME COURT OF GEORGIA

Case No. S04C0395 Atlanta, March 05, 2004

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

BLUE CIRCLE, INC. v. GEORGIA DEPARTMENT OF REVENUE et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

s/ Sherie M. Welch, Clerk

No. 03-1603

Supreme Court, U.S.
FILED
JUL 1 - 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BLUE CIRCLE, INC., an Alabama Corporation,

Petitioner,

v.

GEORGIA DEPARTMENT OF REVENUE and BART L. GRAHAM, REVENUE COMMISSIONER,

Respondents.

On Petition For A Writ Of Certiorari To The Superior Court Of Cobb County, State Of Georgia

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

I.

Whether this Court has jurisdiction to grant certiorari where Petitioner did not raise its federal constitutional objections to Georgia's appellate procedure until it filed its motion for reconsideration before the Georgia Supreme Court and where there exists an independent state procedural ground barring this Court's consideration of the federal constitutional claims Petitioner attempts to raise.

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STATEMENT OF THE CASE

Because the Petition misstates the record evidence and fails to provide this Court with a correct procedural history of this matter, Respondents briefly set forth the pertinent facts and procedural history.

The above captioned matter arose from the Respondents' denial of Petitioner's seventeen Claims for Refund ("Claims") of state and local sales and use taxes allegedly paid on its purchases of various items used at its manufacturing facility in Georgia. Petitioner claimed an exemption from the tax pursuant to O.C.G.A. § 48-8-3(35) (the "Industrial Materials Exemption") for the tax periods September 1, 1991 through September 30, 1995 ("the Refund Period").

In August of 1992, after a conference with the Petitioner, Respondents issued a determination to the Petitioner on the taxability of coal, coke, grinding materials and shotgun shells as used at Petitioner's Georgia cement manufacturing plant. On October 16, 1995, Petitioner acquiesced on the taxability of the shotgun shells but, pursuant to O.C.G.A. § 48-2-35, filed its Claims with respect to refractory brick, grinding materials (iron chains and iron balls) and coal and coke purchased during the Refund Period. If Petitioner had desired a hearing before the Commissioner on the taxability of these items, it was required to, but did not, request such a hearing on the Claims as provided by O.C.G.A. § 48-2-35(b)(2).

Nevertheless, Respondents held a second informal conference with Petitioner. After again considering Petitioner's refund claims, Respondents denied Petitioner's

refund claims by letter dated April 17, 1996.[1] Thereafter, Petitioner instituted a refund action in the Superior Court of Cobb County, Georgia.

The parties filed cross motions for summary judgment in the superior court. On May 5, 2003, the superior court granted Respondents' motion for summary judgment.

On June 2, 2003, Petitioner filed a Notice of Appeal to the Georgia Court of Appeals in the Superior Court of Cobb County pursuant to O.C.G.A. § 5-6-34. However, because the Superior Court's order appealed reviewed a decision of an administrative agency, Petitioner was required to file an Application for Discretionary Review in the Georgia Court of Appeals. O.C.G.A. § 5-6-35. This procedural error deprived the Georgia Court of Appeals of jurisdiction to hear the appeal. *Olin Corporation v. Collins*, 493 S.E.2d 493 (Ga. 1992). Therefore, the Georgia Court of Appeals properly dismissed the appeal.

Petitioner filed a motion for reconsideration in the Georgia Court of Appeals, which was denied. Petitioner then sought a discretionary grant of certiorari from the Georgia Supreme Court, which also was denied. Petitioner then filed a motion for reconsideration in the Georgia Supreme Court in which, for the first time, it raised federal claims of due process and equal protection. The Georgia Supreme Court denied the motion for reconsideration.

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[1] Petitioner makes much of the fact that the letter identified O.C.G.A. § 48-8-3(35)(B) as a regulation rather than a statutory provision. *Petition For A Writ Of Certiorari*, Opinions Below ¶ 1; p. 6. Inasmuch as Petitioner's original Claim asserted an exemption under that statute, Petitioner cannot seriously claim this clerical error somehow deprived it of due process.

Petitioner then filed its Petition for Writ of Certiorari in this Court.

REASONS FOR DENYING THE WRIT

In a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257(a), the burden is on the Petitioner to show that the constitutional question was either addressed by, or properly presented to, the state court that rendered the decision this Court is asked to review. Sup. Ct. R. 14.1(g)(i); *Adams v. Robertson*, 520 U.S. 83 (1997). No Georgia court considered or decided Petitioner's federal constitutional claims. *See Petition for Writ of Certiorari*, Appendices A, B, D, and E.

Principles of comity in the federal system require that the state courts be afforded the opportunity to respond to attacks on state authority based on federal law. *Webb v. Webb*, 451 U.S. 493 (1981). Consequently, Petitioner has the burden of showing that the state courts had a fair opportunity to address the federal question raised. *Illinois v. Gates*, 462 U.S. 213, (1983); Sup. Ct. R. 14.1(g)(i). Petitioner may do so by showing that it raised the issue at the time or in the manner required by state law, or that it presented the issue with "fair precision and in due time." *Adams v. Robertson*, 520 U.S. at 87. Petitioner did not satisfy either of these requirements.

I. Petitioner Did Not Present Its Federal Claims At The Time Or In The Manner Required By State Law.

This Court has consistently held that it is without jurisdiction to hear a case where the federal issue was not raised properly below. *Webb v. Webb*, 451 U.S. 493 (1981). Georgia law provides that certain judgments and rulings are directly appealable, O.C.G.A. § 5-6-34(a), while appeal in other cases must be by an application for discretionary appeal ("application"). O.C.G.A. § 5-6-35(a). Appeals from decisions of the superior courts reviewing decisions of state and local administrative agencies are among those cases where appeal is required to be by application. O.C.G.A. § 5-6-35(a)(1).

The Georgia Department of Revenue ("Department") is a state administrative agency. O.C.G.A. § 48-2-1. Consequently, appeals from decisions of the superior courts reviewing decisions of the Department are required to be by application. *Olin Corporation v. Collins*, 413 S.E.2d 193 (Ga. 1992) (appeal from denial of claim for refund); *Miles v. Collins*, 384 S.E.2d 630 (Ga. 1989) (appeal from tax assessment).

Therefore, the time and manner for Petitioner to raise the issues of the sufficiency of Respondents' review of its refund claims, its right to direct appeal, and its due process and equal protection claims properly would have been made in an application. Had Petitioner followed the correct procedural process, and the Georgia Court of Appeals denied its application, the issues it attempts to raise before this Court would have been preserved for further review. However, Petitioner did not file the required application. Consequently, Petitioner did not raise the issue at the time or in the manner required by state

law and this Court is without jurisdiction to consider Petitioner's claims.

II. Petitioner Did Not Raise Its Federal Claims With Fair Precision And In Due Time.

Neither did Petitioner raise its federal claims with "fair precision and in due time." *Adams v. Robertson*, 520 U.S. at 87. This Court has consistently held that the mere citation to a federal case in the midst of an unrelated argument is insufficient to inform a state court that a federal claim has been raised. *Id. See also Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988) (generic reference to Fourteenth Amendment not sufficient to preserve a constitutional claim); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) (vague appeal to constitutional principles does not preserve constitutional claim); *Webb v. Webb*, 451 U.S. 493 (1981) (failure to raise clearly constitutional question deprived Court of jurisdiction to hear the appeal). At a minimum there should be no doubt from the record that a claim under a federal statute or the federal constitution was presented to the state courts. *Webb v. Webb*, 451 U.S. at 501. A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and then wait for review in this Court to specify its constitutional claims. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 77.

Petitioner's response to Respondents' motion to dismiss its appeal before the Georgia Court of Appeals was based solely on state law. Appellant's Response to Appellees' Motion to Dismiss pp. 1 through 2. Relying solely on *McCaughey v. Murphy*, 473 S.E.2d 594 (Ga. 1996), Petitioner asserted that Respondents' review of its refund

claims was inadequate, giving rise to a right to direct appeal. Although Petitioner made reference to *Reich v. Collins*, 513 U.S. 106 (1994), Petitioner did not raise a constitutional challenge to Georgia's appellate procedures.[2] *Id. See also Appellant's Supplemental Response to Appellees' Reply Brief in Support of Motion to Dismiss Appeal* p. 2 ("[i]mplicit in the Georgia Code is that the Appellee grants the taxpayer a meaningful review of his [sic] claim.").

The Georgia Court of Appeals granted Respondents' motion to dismiss. Petitioner then filed a motion for reconsideration in the Court of Appeals. Although Petitioner again cited to *Reich v. Collins, supra*, Petitioner did not raise either a due process or an equal protection claim.

Neither did Petitioner raise such a claim in its Petition for Certiorari in the Georgia Supreme Court. Petitioner's sole enumeration of error was that, "the Court of Appeals erred in failing to apply the two-tribunal requirement of *McCaughey v. Murphy*, 473 S.E.2d 762 (Ga. 1996) to allow Appellant's direct appeal of its tax refund claim denial." *See Appellant's Petition for Certiorari* p. 9. Moreover, its general discussion of "constitutional due process" cites to the Georgia Constitution.[3] *Id.*

Not until Petitioner filed its motion for reconsideration in the Georgia Supreme Court did it raise and argue due process and equal protection pursuant to the federal constitution. Federal claims raised for the first time in a

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[2] It is worth noting that Petitioner's jurisdictional statement in its brief on the merits, filed subsequent to Respondents' motion to dismiss, also relied solely on *McCaughey. Appellant's Brief pp. 4 through 5.*

[3] Petitioner's brief raised no equal protection claim.

motion for reconsideration will not be reviewed by this Court. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 77.

III. Independent State Procedural Grounds Bar This Court's Consideration of the Petitioner's Federal Claims.

It is well settled that "failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." *Michigan v. Tyler*, 436 U.S. 499, 512 (1978). As set out above, Georgia law provides an appellate procedure in which appeals from decisions of the superior courts reviewing decisions of an administrative agency such as the Georgia Department of Revenue are required to be by application. *Olin Corporation v. Collins*, 413 S.E.2d 193 (Ga. 1992) (appeal from denial of claim for refund); *Miles v. Collins*, 384 S.E.2d 630 (Ga. 1989) (appeal from tax assessment). Failure to follow the correct appellate procedure deprives the appellate court of jurisdiction to hear the appeal.

Georgia has a legitimate interest in enforcing this procedural rule. It both allows the appellate courts to ease their increasingly large case loads, *Scruggs v. Georgia Dep't of Human Resources*, 408 S.E.2d 103 (Ga. 1991), and to review expeditiously decisions of the superior courts reviewing decisions of administrative agencies without issuing an opinion in every case. *Tri-State Building & Supply, Inc. v. Reid*, 302 S.E.2d 566 (Ga. 1983).

Therefore, even if Petitioner had raised its federal constitutional claims in its response to Respondents'

motion to dismiss, the Georgia Court of Appeals would have been without jurisdiction to review or rule on the questions. Consequently, failure to follow the correct Georgia appellate procedure is an independent and adequate state ground of decision barring review in this Court.

In seeking to avoid this result, Petitioner relies on *McCaughey v. Murphy*, 473 S.E.2d 762 (Ga. 1996). Such reliance is misplaced. In *McCaughey*, the Georgia Supreme Court held that when an administrative agency satisfies the statutory requirements for its review of a matter, and the superior court also reviews the matter, any appeal from the decision of the superior court must be made by application.

The statutory requirements for Respondents' review of a claim for refund are set out in O.C.G.A. § 48-2-35 ("Refund Statute"). The Refund Statute provides that it is the responsibility of the taxpayer to file a claim for refund that contains a "summary statement of the grounds upon which the taxpayer relies." O.C.G.A. § 48-2-35(b)(1). The taxpayer may provide the Commissioner with any information the taxpayer believes relevant at the time it files the claim. In addition to providing information, if the taxpayer desires a conference or hearing before the Commissioner, "he shall specify such desire *in writing* in the claim." O.C.G.A. § 48-2-35(b)(2) (emphasis added). Absent a written request, the Commissioner has no duty to provide a hearing, although he may do so, as he did twice in the instant matter, as a matter of accommodation. Ga. Comp. R. & Regs. 560-1-1-.12 (1965) (informal conference may be had at the discretion of the Commissioner).

Each of Petitioner's claims for refund contained the same five sentence paragraph (excluding the code section under which it was claiming the exemption) setting out its summary statement of grounds upon which it relied. The claims for refund did not contain a written request for a conference or hearing. The Petitioner complains that the Respondents' form contains no space for requesting a conference. *Petition* p. 6. However, this Court should note that the Respondents' form has instructions telling the taxpayer to "[a]ttach additional pages if necessary." Accordingly, there was clearly adequate space to request a conference. Furthermore, there is no evidence in the record that Petitioner was prevented from requesting a conference because of lack of space on the form, or for any reason.

Having received a claim for refund, the Commissioner has a statutory obligation to "consider information contained in the taxpayer's claim for refund, together with such other information as may be available." O.C.G.A. § 48-2-35(b)(3). Such other information includes, without limitation, information contained in the relevant statutes, regulations, case law, past rulings by the Department of Revenue ("Department"), and information gathered by Department personnel either from the taxpayer or otherwise.

Petitioner asserts that Respondents refused to consider information Petitioner supplied relevant to its claim. *Petition* p. 7. However, Petitioner's assertion that the Commissioner willfully disregarded his statutory duties fails because Petitioner is bound by its earlier admissions to the contrary. *See Martin v. Pierce*, 232 S.E.2d 170 (Ga. App. 1977) (party to an action is bound by material allegations made in his pleadings). Petitioner previously admitted that the Respondents responded to its requests for a

revenue ruling on the taxability of the items at issue in the litigation. Moreover, it is clear from the Commissioner's letter ruling that he was familiar with Petitioner's arguments and rejected them.

In addition, Petitioner previously admitted that the Commissioner held an informal conference to receive and consider the information Petitioner provided. Such information did not alter the Commissioner's determination. However, the Commissioner's letter to Petitioner after the conference evidences that he had carefully considered Petitioner's argument. Further, the letter provided the basis for the Commissioner rejecting such arguments as unpersuasive.

There simply is nothing in the record to support an allegation that the Commissioner refused to consider any evidence Petitioner presented. To the contrary, the record is replete with evidence that the Commissioner considered all of Petitioner's contentions before making his determination.

When the Commissioner has considered all of the information available and made a determination, he has a statutory duty to "notify the taxpayer of his action." O.C.G.A. § 48-2-35(b)(3). The statute does not require the Commissioner to issue findings of fact or conclusions of law. Petitioner admits that the Commissioner notified it of his determination. Accordingly, each and every statutory duty under the Refund Statute was satisfied.

Georgia law is clear that where an administrative agency makes a determination in accordance with its statutory duties and such determination is then reviewed by a superior court, any further appeal must be by application. *McCaughey v. Murphy*, 473 S.E.2d 762 (Ga. 1996).

Consequently, Petitioner's failure to follow the correct Georgia appellate procedure provides an independent and adequate state ground of decision barring review in this Court.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Respondents pray that this Court decline to grant the instant Petition for a Writ of Certiorari.

Respectfully submitted,

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